TSENG CHOON CHIN & ORS A

v.

LING KUOK TECK & ANOR AND ANOTHER CASE

HIGH COURT MALAYA, SABAH & SARAWAK B
DAVID WONG DAK WAH JC
[CIVIL SUITS NOS: 22-1991 & 23-1991]
29 DECEMBER 2006

CONTRACT: *Consideration - Development agreement - Where landowner employed developer to develop land and in consideration landowner will transfer agreed subdivided sublots to developer upon completion of development agreement - Developer's right only to sue landowner for compensation and not for transfer of sublots - Whether developer had become beneficial owner of sublots - Non completion by developer - Effect* C

D

LAND LAW: *Sale of land - Beneficial ownership - Whether purchasers of land obtained beneficial interest in land - Purchasers only possess contractual rights against developer where developer itself does not have beneficial interest in land - Developer cannot pass to purchasers a better interest in land than what developer has*

E

DAMAGES: *Special damages - No proof of loss of items - No receipts - No award - Court cannot speculate*

Two cases were jointly tried here as the suits contained the same plaintiffs with different defendants but involving common facts and issues F
of law. The plaintiffs, registered owners of 2 parcels of land, had entered into an arrangement (the development agreements) with one Sie Chung Tung ('the developer') to develop the said lands. The crux of the arrangement was for the plaintiffs to provide the said lands for development and the developer would, at his entire cost and expense, G
build the agreed lots of residential and commercial buildings. To facilitate development of the said lands, the plaintiffs agreed to allow the said lands to be charged as security for loans obtained by the developer. The defendants in the first case, by an agreement dated 16 July 1983, purchased from the developer Sublot 35 for RM98,000. The defendants H
in the second case, by an agreement dated 9 August 1983, purchased from the developer Sublot 22 for RM90,000. The 4th plaintiff then discovered that the developer had in express breach of the development agreements wrongfully sold Sublot 35 and Sublot 22 to the respective defendants without the knowledge and consent of the plaintiffs. The I
plaintiffs then took out the present two suits claiming, *inter alia*, that the plaintiffs were at all material times entitled to Sublots 35 and 22 and for damages. On 12 October 1987, the developer was adjudicated a

bankrupt. The official assignee by notice disclaimed the development agreements. Subsequent to the disclaimer, the plaintiffs on 12 March 1990 entered into an agreement with the banks where they agreed to arrange for all 41 sublots to be redeemed from the banks. The main issue arising was, what rights did the defendants acquire from the agreements entered between them and the developer.

Held (for the plaintiffs):

(1) The relationship between the developer and the plaintiffs was one where the plaintiffs had employed the developer to execute certain works to develop the said lands and in consideration thereof, the plaintiffs will pay the developer by transferring various agreed subdivided sublots from the said lands provided the developer had complied with his obligations under the development agreements. If the plaintiffs had refused to transfer to the developer his portion of the subdivided sublots, the developer could only sue the plaintiffs for compensation. The developer's right was only to sue for compensation for damages and not for the transfer of the agreed subdivided sublots. The developer had failed to perform his obligations under the development agreements and therefore the developer had not become beneficial owner of Sublot 35 and Sublot 22. (paras 20 & 21)

(2) The defendants had only contractual rights against the developer from the 2 sale and purchase agreements and will acquire interests in the sublots which they had purchased only upon the developer fulfilling the terms and conditions in the development agreements. The developer could not pass to the defendants a better interest in the said sublots than he held. Hence the remedy for the defendants was only against the developer. The official assignee's disclaimer of the development agreements wiped out whatever rights which the defendants had against the plaintiffs since the foundation of the 2 sale and purchase agreements was the development agreements. (paras 23 & 24)

(3) Since the plaintiffs had led no evidence as what damages they suffered, no damage was awarded. Counsel when proving loss or damages must produce proofs. When none is produced, the court is left with no alternative but not to award any damages. The court cannot speculate. (paras 25 & 27)

(4) The plaintiffs were at all material times the rightful owners of Sublot 35 and Sublot 22. (para 33)

Case(s) referred to:
Bonham-Carter v. Hyde Park Hotel [1948] WN 89 ***(refd)***
Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 FC ***(refd)***
Government of the State of Sabah v. Suwiri Sdn Bhd [2005] 4 CLJ 727 CA ***(refd)***
Lee Sau Kong v. Leow Cheng Chiang [1961] MLJ 17 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 59(1)

For the plaintiffs - David HP Kuok; M/s Wong, Orlando Chua & Kuok
For the defendants - Wong Ho Leng; M/s Wong Hong Leng & Co

Reported by Amutha Suppayah

JUDGMENT

David Wong Dak Wah JC:

Introduction And Background Facts

[1] Before me are two cases, namely, suit no. 22 of 1991 (first case) and suit no. 23 of 1991 (second case) and they were jointly tried as the suits contained the same plaintiffs with different defendants but involving common facts and issues of law.

[2] The salient facts of the two cases are these. The plaintiffs were the registered owners of two parcels of land comprised in Sibu Occupation Ticket Nos. 35431 and 24012 ('the said lands') and on the 7 November 1978, the plaintiffs and their late mother Sim Chui Peng ('Sim') entered into an arrangement with one Sie Chung Tung ('the developer'), the sole proprietor of a firm known as Sie Chung Tung Housing Development Company, to develop the said lands. The crux of the arrangement was for the plaintiffs and Sim to provide the said lands for development and the developer would, at his entire cost and expense, build the agreed lots of residential and commercial buildings. This arrangement was governed by three agreements, the Development Agreement dated 7 November 1978 (pp 1-12 – exh. A), 1st supplementary agreement dated 18 July 1981 (pp 13-18 – exh. A) and the 2nd supplementary agreement (pp 19-26 – exh. A) (collectively referred to as the 3 development agreements). The supplementary agreements were made to suit the changing circumstances.

[3] To facilitate development of the said lands, the plaintiffs and Sim agreed to allow the said lands to be charged as security for loans obtained by the developer.

[4] The defendants in the first case by an agreement dated 16 July 1983 (p. 68 exh. "A") purchased from the developer Sublot 35 (now known as Lot 448 Block 4 Sungai Merah Town District) for RM98,000. The defendants had made a total part payment of RM60,000 to the developer.

[5] The defendants in the second case by an agreement dated 9 August 1983 (p. 203 exh. "A") purchased from the developer Sublot 22 (now known as Lot 435 Block 4 Sungai Merah Town District) for RM90,000. The defendants had made a total part payment of RM81,500 to the developer. The two agreements are collectively referred to as "the 2 sale and purchase agreements."

[6] On or about December, 1983, the 4th plaintiff allegedly discovered that Sublot 35 and Sublot 22, which were specifically allocated to the plaintiffs under the 2nd Supplementary Agreement, had been occupied by the respective defendants in both suits and, from enquires made, the 4th plaintiff also learned that the developer had in express breach of cl. 1 of the 2nd Supplementary Agreement wrongfully sold Sublot 35 and Sublot 22 to the respective defendants allegedly without the knowledge and consent of the plaintiffs.

[7] Upon discovery that the defendants were in wrongful occupation of Sublot 35 and Sublot 22, the 4th plaintiff immediately informed them that they had no right to stay there. Negotiations were carried out between the parties to resolve the matter but to no avail resulting the plaintiffs taking the present two suits. Prior to the taking out these suits, it is not disputed that the defendants were allowed to remain in possession of Sublot 35 and Sublot 22.

[8] In both cases, the plaintiffs on 12 June 1992 obtained summary judgment against the defendants and had executed the same, resulting the eviction of the defendants from Sublot 35 and Sublot 22. The summary judgment in the first case was set aside by this court on 22 March 1995 by way of a different suit taken out by the defendants. Appeal by the plaintiffs to the Court of Appeal was dismissed on 21 May 2002. The summary judgment in the second case was later set aside by an order of the court on 31 January 2004. The defendants in the second case moved back into Sublot 22 after the setting aside of the summary judgment. But the defendants in the first case were not able to move back into Sublot 35 as the same had been sold to a third party.

[9] Sometime at the end of 1985, the Lands and Surveys Department was ready to issue the separate new documents of title for each of the 41 subdivided lots in the said lands. The respective land titles in Sublot 22 and Sublot 35 were issued to the plaintiffs on or about 6 November 1985.

[10] On 12 October 1987, the developer was adjudicated a bankrupt by the High Court in Kuching. This bankruptcy no doubt created dire consequences for the whole housing project as the title deeds to the subdivided lots were still charged to the banks. The plaintiff had to come to the rescue and negotiated with the banks to accept RM1,596,000 instead of RM2,419,483.01 due to them as at 31 December 1989 and the plaintiffs paying or cause to pay a sum of RM38,000 for each of the 41 sublots in order to redeem the title deeds from the banks. Because the developer's status as a bankrupt, any agreement with the banks had to be sanctioned by the official assignee who on 9 November 1989, in exercise of the authority vested in him by s. 59(1) of the Bankruptcy Act 1967, by notice disclaimed the 3 development agreements. Subsequent to disclaimer, the plaintiffs on 12 March 1990 entered into an agreement with the banks where they agreed, *inter alia*, to arrange for all 41 sublots to be redeemed from the banks by payment of RM38,000 in respect of each lot on or before 30 June 1990 failing which the banks were at liberty to commence foreclosure proceedings against the said lots. Subsequently, all the 41 sublots were discharged by the purchasers or by some of the purchasers from the banks.

The Claims And Counterclaims

[11] The plaintiffs' claims in the first case are:

(1) a declaration that the plaintiffs were at all material times entitled to the said Sublot 35;

(2) (withdrawn by counsel and struck out on 29 Dcember 2006)

(3) a declaration that the Sale of the Sublot 35 is now null and void and/or non enforceable in law *ab initio*;

(4) a declaration that the plaintiffs were at all material times the rightful owners of Sublot 35;

(5) a declaration that the defendants were trespassers of Sublot 35;

(6) (withdrawn by counsel and struck out on 29 December 2006);

(7) damages;

(8) any other relief as this Honourable Court deemed fit;

(9) costs.

[12] The defendants' counter claims in the first case are:

1. damages:

   (a) the sum of RM60,000 that had been paid by the defendants to the developer under para 3 aforesaid;

   (b) the sum of RM2000 that was paid under para 8 aforesaid;

   (c) general damages for loss of the said land at the market value of the said land as at the date of judgment;

2. interest on the damages aforesaid at such rate and such period as the honourable court deems fit to grant;

3. further and other reliefs; and

4. costs.

[13] The plaintiffs' claims in the second case are:

(1) a declaration that the plaintiffs were at all material times entitled to the said Sublot 22;

(2) possession of the said Sublot 22

(3) a declaration that the Sale of the Sublot 22 is now null and void and/or non enforceable in law *ab initio*;

(4) a declaration that the plaintiffs were at all material times the rightful owners of the said Sublot 22;

(5) a declaration that the defendants were trespassers of the said Sublot 22;

(6) Loss of rental at the rate of RM300 per month from July 1990 until possession is delivered up;

(7) damages;

(8) any other relief as this Honourable Court deemed fit;

(9) costs.

[14] The defendants' counter claims in the second case are:

(1) An order that the plaintiffs transfer or cause to be transferred the said Land to the defendants upon the defendants paying to the plaintiffs through their solicitors the sum of RM8,500 being the balance payable to the developer under the sale and purchase

agreement dated 16th July 1983 between the defendants and the developer and the sum that the plaintiff had paid to Kong Ming Bank and Kong Ming Finance Corporation Bhd in order to redeem Sublot 22 that was charged to Kong Ming bank Bhd and Kong Ming Finance Corporation Bhd;

(2) further and other reliefs; and

(3) Costs.

[15] In respect of prayer 5 in both suits, Mr David H P Kuok (Mr David Kuok), learned counsel for the plaintiffs, from the bar conceded the defendants can only be trespassers from the date of this writ of summons as they had the plaintiffs' consent to remain in the Sublots 35 and 22.

The Issues

[16] The pivotal issue in both cases in my opinion is this.

What Rights Did The Defendants Acquire From The Agreements Entered Between Them And The Developer?

[17] If they are merely contractual rights against the developer, then the plaintiffs' claims must prevail. To determine this issue, the starting point is to examine the 2 sale and purchase agreements. Firstly the notable factor of these 2 agreements is that they were agreements entered between the defendants and the developer who is not a party to the suits here. Secondly the defendants are relying on the 2 sale and purchase agreements to base their claims. This is evident from the submission of the defendants' counsel, Mr Wong Hong Leng (Mr Wong) where he relied heavily on the phrase 'beneficial owner' to describe the developer. This phrase is stated in the preamble of the 2 sale and purchase agreements and it states as follow:

> By virtue of an agreement dated the 7th day of November 1978 and made between the registered co-proprietors of those two (2) parcels of land situate at Sg. Antu, containing areas of 7 acres and 1.85 acres, more or less and comprised in Sibu Occupation Ticket No 35431 and 24012 respectively (hereinafter jointly referred to as the said lands)as the Landowners of the one part and the vendor as the developers of the other part, the Vendor is the beneficial owner *inter alia* Sublot 35 comprised in the said Land (hereinafter called "the said sublot")

[18] Whether or not the use of the words 'beneficial owner' is correct in law must be determined from what are stated in the 3 development agreements which gave birth to the 2 sale and purchase agreements so to speak.

[19] The relevant clauses in my opinion are recital C, cls. 7, 20, 21 and 22 of the Development Agreement. These clauses state as follows:

Recital C

> The owners are desirous of developing the said Land into a housing estate to be known as " Taman Sin Heng Hua "(herinafter referred to as "the said housing estate") with its main access road to be named "Jalan Tay Ho Chin" and the Developers have agreed to undertake the amalgamation subdivision conversion change of title conditions planning earth filing construction and completion and general development of the said housing estate on barter basis and subject to the terms and conditions hereinafter contained.

Clause 7

> In consideration of the works undertaken by and the obligations of the Developers detailed in this Agreement the Owners shall allocate the houses in the said housing estate to the Developers and themselves as follows:

Clause 20:

> The owners shall transfer to the Developers and/or their nominees their share of the shophouses and residential houses within one (1) month from the date of completion of the shophouses and residential houses for the Owners and settlement of the delay compensation (if any) aforementioned and of the bank loan account.

Clause 21

> If the Developers shall fail or refuse or be unwilling or unable to observe and perform their obligations under this agreement the owners shall be entitled to claim against the Developers for damages in addition to and/or *in lieu* of the remedies mentioned herein or available at law.

Clause 22

> In the event that the Owners shall fail or refuse or unwilling or unable to transfer to the Developers and/or their nominees the Developers' share of shophouses and residential houses as aforesaid without just cause the Owners shall indemnify the Developers for all costs and expenses improvements for construction and general development of the said housing estate incurred by the Developers and in addition thereto the Owners shall compensate and pay to the Developers such damages as may be deemed but under the law for the time being in force in Sarawak

[20] From the above clauses, one can easily distil that the relationship between the developer and the plaintiffs is one where the plaintiffs had employed the developer to execute certain works to develop the said lands and in consideration thereof, the plaintiffs will pay the developer by transferring various agreed subdivided sublets from the said lands provided the developer had complied with his obligations under the 3 development agreements. Not only that, even if the plaintiffs had refused to transfer to the developer his portion of the subdivided sublots, the developer can only sue the plaintiffs for compensation. This much is clear in cl. 22 of the Development Agreement which quite clearly shows that the developer can only obtain beneficial ownership of his subdivided sublots when they are transferred to him. The developer's right is only to sue for compensation for damages and not for the transfer the agreed subdivided sublots.

[21] In any event, there is no dispute here that the developer had failed to perform his obligations under the 3 development agreements. In fact it was the plaintiffs who had rescued the housing project and redeemed the various title deeds from the banks. That being the case, it would be wrong in law and fact to hold that the developer had become beneficial owners of Sublot 35 and Sublot 22.

[22] Further the defendants' contention that the developer had beneficial ownerships of Sublot 35 and Sublot 22 is inconsistent to the principle stated in the case of *Borneo Housing Mortgage Finance Bhd. v. Time Engineering Bhd.* [1996] 2 CLJ 561 FC where the Federal Court held as follows:

> In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then the vendor divests himself of his interest in land.

[23] The principle in the above case is simple and it is this. For the developer to have beneficial ownership the developer must complete the projects in accordance to the terms and conditions provided for in the 3 development agreements to satisfy the "payment of the full purchase price" condition. The use of the phrase "beneficial owners" in the 2 sale and purchase agreements does not help the defendants as one must be concerned with the substance and not the form. The substance of course is that the defendants had only contractual rights against the developer

from the 2 sale and purchase agreements and will acquire interests in the sublets which they had purchased only upon the developer fulfilling the terms and conditions in the 3 development agreements.

[24] For reasons given above, I agree with Mr. David Kuok that 'the developer could not pass to the defendants a better interest in the said sublots than he held and what he had was a contractual right against the developer'. Hence the remedy for the defendants can only be against the developer. And their position was made worse by the official assignee's disclaimer of the 3 development agreements. The disclaimer in my view completely wipes out whatever rights which the defendants had against the plaintiffs for the simple reason that the foundation of the 2 sale and purchase agreements was the 3 development agreements. What the defendants should have done was to lodge their claims and/or make representation of their predicament to the official assignee.

[25] I come now to the claim of damages by the plaintiffs. In his submission, Mr. David Kuok requested that damages be assessed by the Senior Assistant Registrar. Mr. Wong pointed out to the court that this is inconsistent with the prayers 7 in both statements of claim. With respect I agree with Mr. Wong and I do so for the simple reason that it was not pleaded at all. The way prayer 7 was framed requires the plaintiffs to prove their damages at this trial. In another words, both issues of liability and damages are to be determined in this trial. Mr. David Kuok should at the very least have informed the court and Mr. Wong at the start of the trial that he wanted to deal with the issue of liability first leaving the issue of damages to be assessed by the SAR. This was not done at all. And since the plaintiffs had led no evidence as what damages they suffered, no damage is awarded.

[26] As for the claim for loss of rental, the plaintiffs had also not led any evidence as to what the reasonable rental should be. Further more as confirmed by Mr. David Kwok, there was no evidence led as to the time when the defendants were evicted from sublot 22 and when they regained possession after the summary judgment was set aside. This is what he transpired between counsels:

Mr. Wong:

> I am not very sure whether this is proper in law. In any event, I submitted that the proposed amendment would be futile on the ground that there is no evidence as to when possession had been delivered up. As far as this case is concerned, my clients had moved back after the judgment had been impeached. My clients moved out after the summary judgment was obtained by the Plaintiff on 12th June 1992, (page 118 in the Bundle of

> Authorities). In fact I assure the Court that there is no evidence documentary or otherwise to show when my clients were evicted and moved back. This with respect is the duty of the Plaintiff to produce such evidence.

Mr. Kuok:

> I confirm that there is no evidence documentary or otherwise in the trial to show that when the Defendants were evicted and moved back to the premises

[27] With respect, counsel when proving loss or damages must produce proofs. In this case a report of a reputable real estate agent as to what the rental for the same sort of lodgings as sublots 35 and 22 should have been tendered. When none was produced, the court is left with no alternative but not to award any damages. The court cannot speculate.

[28] This much is clear from the dicta of Thomson CJ in *Lee Sau Kong v. Leow Cheng Chiang* [1961] MLJ 17 where he quoted Lord Goddard's dictum in *Bonham-Carter v. Hyde Park Hotel* [1948] WN 89 with approval, namely, that:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

[29] This principle has been restated in the recent case of *Government of the State of Sabah v. Suwiri Sdn. Bhd.* [2005] 4 CLJ 727 CA, where the Court of Appeal (majority decision) said:

> "As for the claim for damages for breach of contract, the respondent must strictly prove its loss or damage. In the present case, the learned JC awarded the respondent RM21,890.113.75 as damages for the defendant's alleged breach of contract on the unchallenged evidence of PW2 which appeared to the learned JC to be clear and comprehensive. However, on the evidence, the respondent had failed to prove it. A profit projection even though unchallenged is not sufficient to establish the would-be losses of profit especially taking into account exigencies, risks and fluctuations in the logging and timber trade which will have an impact on the alleged projected profits (see *Sime Properties Bhd v. Woon Nyoke Lin* [2002] 3 CLJ 719; *KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1994] 3 CLJ 1).

[30] I come now to the defendants' counterclaims. Though what I have said so far is enough to dismiss the counterclaims, it should be noted that I cannot find any cause of action from which the defendants can launch their actions to recover of monies paid to the developer. To allow such a claim would infringe the doctrine of privity which simply means that a stranger to a contract cannot be encumbered with burdens under it. So, to succeed, the defendants have to show a tripartite relationship in the first place. Here, the contracting parties under the 2 sale and purchase agreements were the defendants and the developer.

[31] Mr. Wong is aware of this difficulty for the defendants as evidenced from this exchange:

Court:	(To Mr. Wong). My concern is what rights did your client get from the developer under the 2 sales and purchase?
Mr. Wong:	Contractual rights.
Court:	Against whom?
Mr. Wong:	Of course with the developer

[32] Lastly concerning the submissions of counsels about whether or not Sublot 35 and Sublot 22 belonged to the plaintiffs or the defendants, in my opinion, the answer is of no consequence as the legal and beneficial ownership of the Sublot 35 and Sublot 22 had remained with the plaintiffs throughout. In another words, the defendants' interests in the said lots never crystallized. Hence no order will be made by me about the issues of entitlement and possession prayed for by the plaintiffs.

[33] Accordingly I make and declare the following orders:

In Suit No. 22 of 1991

(1) The plaintiffs were at all material times the rightful owners of Sublot 35 (Lot 448 Block 4, Sungai Merah Town District, Sibu);

(2) The defendants were trespassers in Sublot 35 (Lot 448 Block 4, Sungai Merah Town District, Sibu) from the date the writ of summons was issued;

(3) costs be given to the plaintiffs to be taxed unless otherwise agreed by the parties.

(4) In respect of the defendants' counter claims; I dismiss the same with costs to the plaintiffs to be taxed unless agreed.

In Suit No. 23 of 1991

(1) The plaintiffs are and were at all material times the rightful owners of Sublot 22 (Lot 435 Block 4, Sungai Merah Town District, Sibu);

(2) The defendants are and were trespassers in Sublot 22 (Lot 435 Block 4, Sungai Merah Town District, Sibu) from the date the writ of summons was issued;

(3) costs be given to the plaintiffs to be taxed unless otherwise agreed by the parties;

(4) In respect of the defendants' counter claims; I dismiss the same with costs to the plaintiffs to be taxed unless agreed.

[34] Finally I wish to state that in the event of costs being taxed, the taxing officer must take into account that the two cases here had been jointly tried and only one taxing application should be taken out by the plaintiffs.